

NO. 89-439

Supreme Court, U.S.
FILED

OCT 16 1989

JOSEPH F. SPANIOLO, JR.
CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1989

DAVIS OIL COMPANY, ET AL,
Petitioners

versus

WILLIAM P. MILLS, III, ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

F. HENRI LAPEYRE, JR. (APLC)
MATTHEW J. RANDAZZO, III (APLC)
Lapeyre, Terrell, Rusch & Randazzo
400 Poydras Street, Suite 1980
New Orleans, Louisiana 70130-3277
Telephone: (504) 524-5152

COUNSEL OF RECORD
FOR PETITIONERS

Davis Oil Company, Exxon
Corporation, Allen E. Paulson, Vale &
Company and Saturn Energy
Company

and

E. BURT HARRIS
P. O. Box 60626
1555 Poydras Street, Suite 1269
New Orleans, Louisiana 70160-0626
Telephone: (504) 561-3274

OF COUNSEL FOR PETITIONER,
EXXON CORPORATION

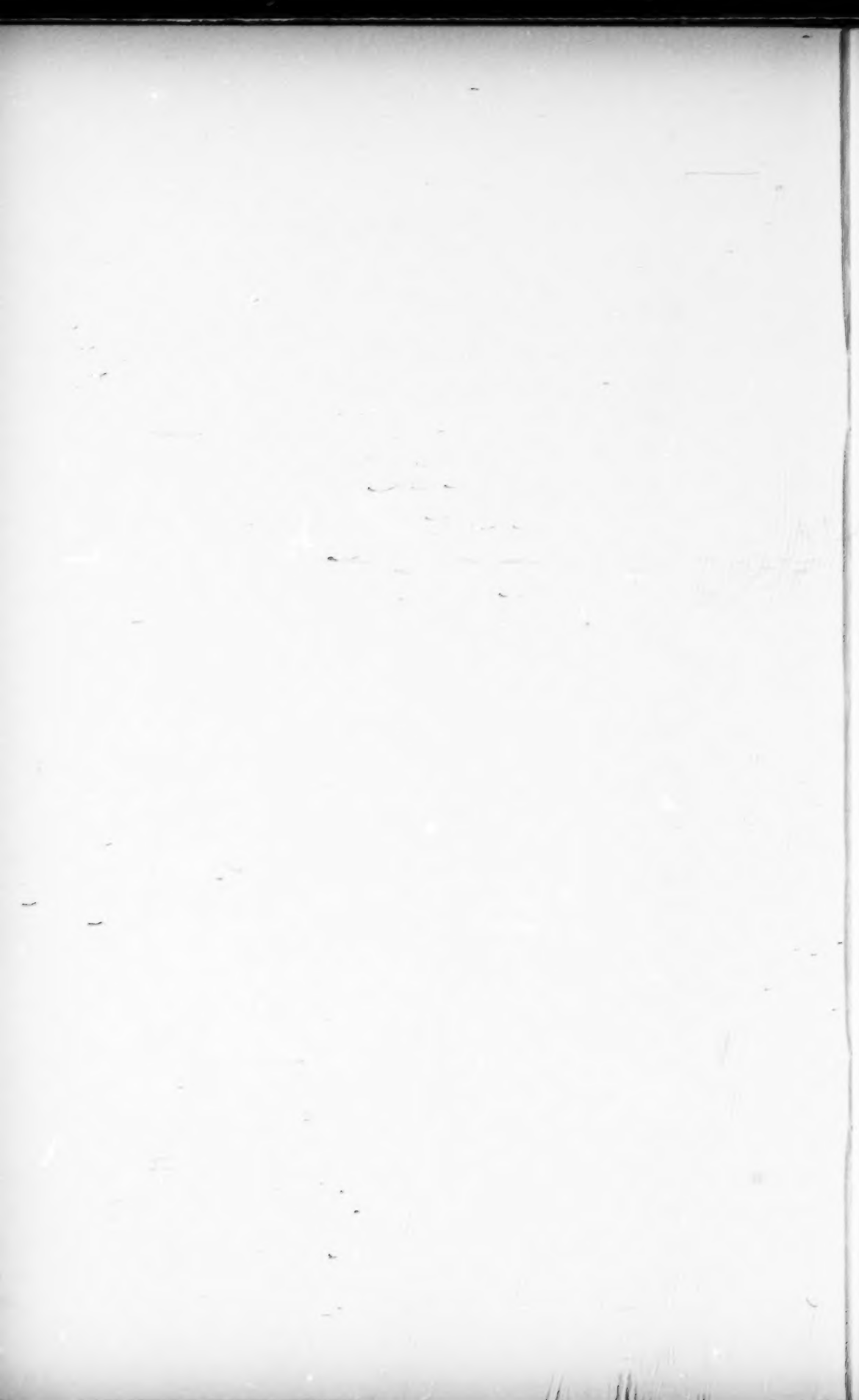


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Petitioners, Davis Oil Company, Exxon Corporation, Vale & Company, Allen E. Paulson and Saturn Energy Company, respectfully file this reply brief pursuant to Rule 22.5 of the Supreme Court Rules and pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in these proceedings on May 15, 1989, rehearing en banc denied on June 14, 1989.

SUMMARY OF REPLY POINTS OF PETITIONERS

As a matter of law and contrary to the allegations of respondents, the standards for notice of a pending state action required by the Due Process Clause of the Fourteenth Amendment demands actual notice be given to all parties with a recorded interest in the property to be affected by the pending state action. Davis Oil Company ("Davis") by virtue of its ownership of an oil, gas and mineral lease ("Subject Lease"), had a legally protectable interest in the property being foreclosed upon ("Subject Tract"), by the First National Bank of Lafayette ("FNB"). The minimum

constitutional precondition in this case, is actual notice, as unequivocally set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Mennonite Board of Missions v. Adams*, 462 U.S. 791 (1983); *Tulsa Professional Collection Services v. Pope*, 485 U.S. 478 (1988); and, *Verba v. Ohio Casualty Ins., Co.*, 851 F.2d 811 (6th Cir. 1988). The Fifth Circuit ignored the aforesaid authorities and held that actual notice to Davis was not required prior to the state action which resulted in the judicial sale of the Subject Tract ("Sheriff's Sale"). The Fifth Circuit and the respondents incorrectly seek to place the burden of discharging the State's Due Process obligation upon the party whose rights are being terminated and not upon the party who uses the State's instrumentalities and officers to cause such termination. By its ruling, the Fifth Circuit has eviscerated the protections afforded by the Constitution to owners of recorded mineral leases and, if such ruling is allowed to stand unaltered by this Court, the rights of all property owners who have recorded deeds will be diminished.

I

ISSUES RAISED BY THE PETITION ARE LEGAL ISSUES

The respondents, William P. Mills, III, John L. Robertson, Brenda Sue Harmon Robertson, Orel Bridges, Jr., and Ethyl Sue Hoffpauir Bridges ("Mills, et al"), and FNB, in their respective Opposition Briefs seek to muddy the waters as to the issues involved in this proceeding. Respondents argue that petitioners are merely seeking a third review of the facts of the case which present questions unique to Louisiana land records, Louisiana mineral interests and Louisiana foreclosure proceedings. Petitioners agree that they are seeking a review of Louisiana's foreclosure proceedings as a matter of law; but, deny that

they are seeking a "third review of the facts of the case". The issues presented are not factual issues unique to Louisiana. Land records, mineral interests and foreclosure proceedings are common to all of the states. Even assuming for the sake of argument that the questions presented are unique to Louisiana, petitioners submit that unconstitutional acts, even though committed in Louisiana, are nevertheless reviewable by the United States Supreme Court.

The threshold issue to be decided by this Court is a legal issue and that issue stated succinctly is "whether or not the Due Process Clause of the Fourteenth Amendment requires that a foreclosing mortgagee provide actual notice to Davis, a mineral lessee, who's publicly recorded interest in property will, under Louisiana law, be extinguished by the seizure and sale of the property affected by Davis' interest therein?" In the instant matter, there was complete disregard for the property rights of others and utter lack of diligence. It is only through smoke and mirrors that the respondents could confuse the legal issue with the facts and argue that the total inaction of the "state-actors" met the "reasonable diligence" standard expressed by this Court. The respondents admit that no attempt was made to examine the Conveyance Records of Lafayette Parish prior to the Sheriff's Sale. They do not deny or refute that an examination of such records would have easily ascertained that Davis had an interest in the property subject to the foreclosure sale and that by a simple letter or telephone call respondents could have notified Davis of the seizure of the Subject Tract and the forthcoming judicial sale.

"Reasonable notice" requires actual notice; a legal principle that this Court has consistently adhered to. See, *Mennonite, Mullane, Pope, supra*; *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1 (1978); *Schroeder v. City of New York*, 371 U.S. 208 (1962); *City of New York v.*

New York N. H. & H. R. Co., 344 U.S. 293 (1953) and *Verba, supra*.

The respondents through their illusions seek to have the writ application of petitioners denied by alleging that petitioners are requesting a factual review. On the contrary, petitioners come in quest of an answer to the question "how could the Fifth Circuit rule that Davis, which has a legally protectable recorded property interest, not be entitled to actual notice without running afoul of this Court's cited rulings and the ruling of the Sixth Circuit in *Verba, supra*?"

We agree with the respondents that the instant case does not merit further review of the facts because the facts are undisputed. What does merit further review is the application of the law set forth by this Court and its application by the Fifth Circuit to the undisputed facts of the instant case.

Respondents' logic is reversed in that they argue the chicken before the egg. In other words, they urge the Court to look to the unsubstantiated allegations they raise - the chicken - and then to hold that the proper legal and factual analysis was utilized by the court below - the egg. Respondents' having failed to file a cross-petition for certiorari cannot now request this Court to review the holding of the Fifth Circuit that Davis had a legally protectable recorded interest in property within the intendment of the Due Process Clause. With that thought in mind, the logical first step is to start with the egg - what is the law regarding notice to persons with a legally protectable recorded interest in property prior to a foreclosure action? We submit that *Mennonite, Pope* and *Verba, supra*, mandate actual notice to such persons as the minimum acceptable protection afforded by the Due Process Clause of the Fourteenth

Amendment. The next step is to apply the law, that actual notice be given if the identity and address of the person to be notified is reasonably ascertainable, to the holding of the Fifth Circuit that Davis had a legally protectable recorded interest in property. The final step in the analysis is to recognize that FNB and the Sheriff made no attempt to examine the Conveyance Records where they could have easily identified Davis' interest. After a step-by-step analysis of the instant situation, the only logical conclusion is that under the established jurisprudence, Davis, as holder of a legally protectable recorded property interest, was entitled to actual notice prior to the Sheriff's Sale and thus, the Subject Lease was not terminated by the Sheriff's Sale and still affects the Subject Tract. See, *e. g.*, *City of New York, supra*, and *Magee v. Amiss*, 502 So.2d 568 (La. 1987). To hold otherwise would result in Davis having a legally "protectable" recorded property interest which is afforded no protection. The right to appear in a foreclosure proceeding or to bid at the sheriff's sale in order to protect one's interest in the property foreclosed is meaningless without notice. *Walker v. City of Hutchinson*, 352 U.S. 112, 115 (1956).

II

FAILURE OF DAVIS TO ACT DID NOT RELIEVE THE STATE, SHERIFF, OR FNB OF THE OBLIGATION TO PROVIDE DAVIS WITH ACTUAL NOTICE OF THE SHERIFF'S SALE

Respondents urge this Court to ignore its prior decisions and rule that Davis' failure to take steps to protect its recorded property interest deprived Davis of the protection afforded by the Due Process Clause of the Fourteenth Amendment. See Pages 15, *et seq.* of the Opposition Brief of Mills, et al and Pages 4, *et seq.* of the Opposition Brief

of FNB. Again, in an attempt to distract the Court's attention from the issue of the gross deprivation of the constitutionally protected recorded property interest of Davis, the respondents have chosen to create another smoke screen to divert this Court's attention. The respondents in their respective briefs make unfounded allegations that Davis knew of the mortgage on the Subject Tract in favor of FNB and made a conscious decision not to obtain a subordination or take other steps to protect its interest. Such allegations are not supported by the record, in fact, the Affidavit of Peter U. Schlegel (the only Davis employee to give testimony) which was submitted into evidence, stated in pertinent part:

" That at the time said lease ["Subject Lease"] was submitted to Davis Oil Company by Louisiana Land Management, Inc., Davis Oil Company was not furnished with any information indicating that the lands covered thereby were covered and affected by any mortgages, liens or other encumbrances;

" That this knowledge did not come to the attention of Davis Oil Company until approximately February 13, 1985. . ."

Considering the testimony of Mr. Schlegel, Davis cannot be charged with the duty to seek a subordination of FNB's mortgage. As pointed out by Mr. Schlegel's testimony, Davis did not become aware of the mortgage or the subsequent Sheriff's Sale of the Subject Tract until some several months after the Sheriff's Sale (the Sheriff's Sale occurred on May 30, 1984) which obviously, would have been much too late to take any steps to protect its interest. As emphasized in *Mennonite, supra*, a party's ability to protect its interest does not relieve FNB and the Sheriff of their due process obligation to actually notify Davis of the Sheriff's Sale, an action which respondents argue resulted

in the termination of Davis' recorded property interest. 103 S.Ct at 2712.

As concluded by the trial judge and upheld by the Fifth Circuit, Davis' failure to utilize the notice mechanism of Louisiana Revised Statute 13:3886 did not constitute an effective waiver of its constitutional right to direct notice as afforded by the Due Process Clause of the Fourteenth Amendment. Further, the trial judge properly held that Louisiana Revised Statute 13:3886 is curative of any constitutional deficiency in Louisiana's constructive notice provisions as they relate to *unidentifiable creditors only*. A creditor with reasonable means to determine the identity of other protected interests, cannot avoid actual notification because the holders of such protected interests failed to invoke Louisiana Revised Statute 13:3886. See, pages A 49-50 of the Appendix of the Petition for a Writ of Certiorari filed in this matter.

The allegations of respondents that Davis was in privy with Kenneth D. Upton, is unfounded and absurd in light of the fact that Mr. Upton acted in collusion with FNB to expedite the seizure and sale of the Subject Tract. See, pages 4 and 8 of petitioner's Petition for a Writ of Certiorari.

Finally, the relief sought by Davis, that the Sheriff's Sale be made subject to the Subject Lease, would not cause any confusion or uncertainty as to land titles because in the act of sale by FNB to Mills, et al it was specifically stated that the sale was subject to all recorded oil, gas and mineral leases affecting the property, a clause which was inserted into the conveyance upon the insistence of FNB after a title opinion had been rendered to Mills, et al and furnished by Mills, et al to FNB which specifically questioned whether the lack of notice to Davis was a violation of the Due Pro-

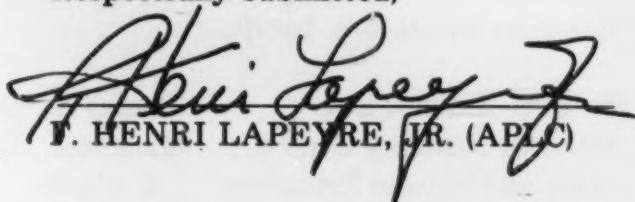
cess Clause. Davis is merely relying upon the legal principle that when an interested party fails to appear at a proceeding because of a lack of constitutionally adequate notice, the outcome of the proceeding is not binding on the non-appearing party. *City of New York, supra*.

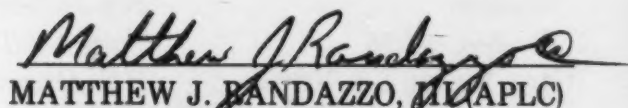
CONCLUSION

In conclusion, it is respectfully submitted that respondents have failed in their Opposition Briefs to distinguish the instant case from the above-cited established jurisprudence of this Court and the Sixth Circuit holding that a party with a recorded property interest is entitled to the Due Process protection of actual notice. The respondent, FNB, has been unable to show justification for its failure to conduct the routine examination of land records as envisioned by this Court in *Mennonite, supra*, and its failure to resort to means less likely than the mail to apprise Davis of the pendency of the Sheriff's Sale. *Mullane* and *Schroeder, supra*. The rights granted unto owners of recorded property interests, such as Davis, are protected by the Due Process Clause of the Fourteenth Amendment and clearly outweigh any "burden", if any, imposed upon future foreclosing creditors. It should be noted that as of the writing of this brief, neither the Sheriff nor the Attorney General of the State of Louisiana have filed opposition briefs. State-actors, such as FNB and the Sheriff, should not be excused from examining the Conveyance Records by asserting, without really knowing what is contained in such records, that such an examination could possibly be unduly burdensome and complicated and thus, in spite of their failure to exert any effort at all, be relieved of their Due Process obligations to provide actual notice to owners of recorded property interests as required by this Court in *Mullane, Mennonite, Schroeder, City of New York*, and the Sixth Circuit in *Verba*.

Accordingly for the reasons set forth herein and in the petitioners' original brief, a Writ of Certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,


F. HENRI LAPEYRE, JR. (APLC)


MATTHEW J. RANDAZZO, III (APLC)
Lapeyre, Terrell, Rusch & Randazzo
400 Poydras Street, Suite 1980
New Orleans, Louisiana 70130-3277
Telephone: (504) 524-5152

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FOR PETITIONERS -

Davis Oil Company, Saturn Energy
Company, Exxon Corporation, Vale &
Company and Allen E. Paulson

and

E. BURT HARRIS
P. O. Box 60626
1555 Poydras Street, Suite 1269
New Orleans, Louisiana 70160-0626

OF COUNSEL FOR PETITIONER -
EXXON CORPORATION

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rules 28 and 33 of the United States Supreme Court three copies of the foregoing Reply Brief have been forwarded to each of the following attorneys representing the respondents in the litigation heretofore, to-wit:

David C. Kimmel, Esq.
Assistant Attorney General
Lands and Natural Resources
Division
P. O. Box 94095
Baton Rouge, LA 70808

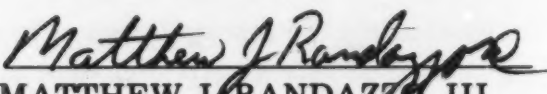
Charles R. Minyard, Esq.
Mangham, Hardy, Rolfs
& Abadie
666 Jefferson Street
Suite 1400
P.O. Drawer 2879
Lafayette, LA 70502

Warren D. Rush, Esq.
Rush, Rush & Calogero
P.O. Box 53713, OCS
Lafayette, LA 70505

Barry J. Heinen, Esq.
202 General Gardner Ave.
Lafayette, LA 70501

Thomas J. Duplantier, Esq.
Domengeaux & Wright
556 Jefferson Street,
Suite 500
Lafayette, LA 70502

by depositing same in the United States Mail, First Class postage prepaid and properly addressed, this 13th day of October, 1989.


MATTHEW J. RANDAZZO, III

